

Kitada (Migration) [2018] AATA 1015 (21 March 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Keiko Kitada
CASE NUMBER:	1608169
DIBP REFERENCE(S):	BCC2015/1668443
MEMBER:	Amanda Mendes Da Costa
DATE:	21 March 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 21 March 2018 at 4:26pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Whether the applicant is in a genuine de facto relationship with the sponsor – Limited evidence of joint finances – No evidence of joint household – No evidence of representation of relationship – Sponsor advised tribunal relationship has ended

LEGISLATION

Acts Interpretation (Registered Relationships) Regulations 2008, r 2.03A(5)
Migration Act 1958, ss 5CB, 65, 359(2), 359A, 360(3)
Migration Regulations 1994, r 1.09A(3), Schedule 2, cl 820.211(2)

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 19 May 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 11 June 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 of Schedule 2 to the Regulations. The delegate assessed the application pursuant to cl.820.211(2), finding it to be the only subclause relevant to her circumstances. The delegate considered that the information and evidence submitted in support of the application was not sufficient to demonstrate that the applicant satisfied the definition of “de facto partner” under s.5CB of the Act.
4. It is in these circumstances that the on 3 March 2017 the Tribunal wrote to Ms Kitada pursuant to s.359(2) of the act, inviting her to provide further information to support her claims that she and Mr O’Keefe were in a de facto relationship. Ms Kitada did not reply to this invitation.
5. As a consequence, pursuant to s.360(3) of the Act the review applicant lost any entitlement she might otherwise have had under the Act to appear before the Tribunal to give evidence and present arguments.
6. On 23 February 2018 Mr O’Keefe advised the Tribunal by telephone that Ms Kitada had left him and returned to Japan. He stated that she was not returning to Australia. The Tribunal has viewed movement records for Ms Kitada, dated 28 February 2018. These records show that Ms Kitada departed Australia on 16 June 2017 and has not returned since that date.
7. On 6 March 2018 the Tribunal wrote to Ms Kitada pursuant to s.359A of the Act, inviting her to comment or provide a response to the information provided to the Tribunal by Mr O’Keefe and the contents of her movement records. The Tribunal received no response to this invitation from Ms Kitada.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in the present case is whether Ms Kitada is Mr O’Keefe’s de facto partner for the purposes of the Act.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

10. Clause 820.211.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present

case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen. The Tribunal notes that a copy of the bio-pages of Mr O'Keefe's passport is on the Department's file. On the basis of the information before it, the Tribunal is satisfied that Mr O'Keefe is an Australian citizen.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

11. As the parties are not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
12. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
13. In assessing these issues, the Tribunal has had regard to all the documents on the Department's and the Tribunal's files.

14. The Financial aspects of the relationship

15. The Tribunal is required to consider all the circumstances of the financial aspects of the relationship.
16. The review applicant provided the Department with a Westpac Choice bank statement dated 29 January 2016-29 February 2016 in her name. This statement was addressed to the same address as Mr O'Keefe. It disclosed one deposit of \$600.00 from Mr O'Keefe's account into this account, dated 16 February 2016. No further documentation regarding the financial aspects of the parties' relationship was provided to either the Department or the Tribunal. Accordingly the Tribunal is unable to make findings regarding the following:
 - (a) any joint ownership of real estate or other major assets;
 - (b) any joint liabilities;
 - (c) the extent of any pooling of financial resources (save for the one deposit of \$600.00), especially in relation to major financial commitments;
 - (d) whether one person in the relationship owes any legal obligation in respect of the other.
17. As a consequence, the Tribunal attaches minimal weight to the financial aspects of the relationship.

18. The nature of the household

19. The parties have not provided any evidence to either the Department or the Tribunal about the nature of the household. Accordingly the Tribunal is unable to make findings regarding any joint responsibility for the care and support of children, the living arrangements of the parties and any sharing of the responsibility for housework. The Tribunal attaches no weight to the nature of the household.

20. *The social aspects of the relationship*

21. Whether the persons represent themselves to other people as de facto partners, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.
22. The review applicant has provided statements from members of the couple's local community and Mr O'Keefe's family regarding the parties' relationship. These included statements from local business owners, a Justice of the Peace and a Member of the Australian Senate. The Tribunal notes that the statements by these persons were made in May and June 2016. The Tribunal also notes that two petitions, signed by members of the local community in support of Ms Kitada remaining in Australia, were provided to the Tribunal. These petitions were signed in June 2016. Whilst the Tribunal accepts that members of Mr O'Keefe's family and the local community accepted the parties as a couple at the date the statements were made, without any further explanation from either Ms Kitada or Mr O'Keefe regarding their relationship, the Tribunal can only place limited weight on this evidence. In relation to the petitions, the Tribunal accepts that the local community have been very supportive of the review application, but attaches no weight to them in respect of the social aspects of the parties' relationship.
23. Accordingly, the Tribunal attaches limited weight to the social aspects of the parties' relationship.

24. *The nature of the person's commitment to each other*

25. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see the relationship as a long term one are all aspects to be considered in determining the nature of the person's commitment to each other.
26. In her visa application, Ms Kitada states that she first met Mr O'Keefe in Hobart, Tasmania, on 15 June 2013. She further states that they committed to a shared life together to the exclusion of all others on 12 October 2013. Mr O'Keefe provides the same information in his Form40SP-Sponsorship for a partner to migrate to Australia. However, the parties have not provided any further statements, made by themselves about their relationship, to either the Department or the Tribunal.
27. The review applicant has provided evidence that the relationship is registered under the *Relationships Act* 2003 (Tasmania) as prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: r.2.03A(5). The Tribunal notes that the review applicant provided a relationship certificate to it, showing that the relationship was registered on 29 April 2014. The Tribunal accepts this certificate as genuine.
28. Ms Kitada has provided a number of photographs of the parties together. However, without any explanation of them by the parties, the Tribunal attaches no weight to them.
29. The Tribunal accepts information provided by Mr O'Keefe by telephone on 23 February 2018, namely that Ms Kitada had ended their relationship and returned to Japan. This information is consistent with the Movement records for Ms Kitada.
30. The Tribunal has very limited evidence about the inception and development of the parties' relationship. Both the review applicant and her sponsor identified 15 June 2013 as the date on which they met and 12 October 2013 as the date on which they committed to a shared life together to the exclusion of all others. The statements from family and community

members support the assertion that the parties' became a couple in October 2013. However these persons have not provided any basis for their beliefs about the commencement and nature of the relationship.

31. The Tribunal considers that it is unable to be satisfied as to the following:
 - the duration of the relationship;
 - the length of time the parties lived together;
 - the degree of companionship and emotional support the parties drew from each other; and
 - whether at the time of the visa application, the parties saw their relationship as a long term one.
32. Accordingly, the Tribunal attaches no weight to the factors relating to the parties commitment to each other.
33. On the basis of Mr O'Keefe's telephone call to the Tribunal on 23 February 2018 and Ms Kitada's movement records the Tribunal is satisfied that the parties' relationship has ended.
34. For the reasons given with respect to the r.1.09A(3) matters, the Tribunal is not satisfied that at the time of application and at the time of this decision, Ms Kitada and Mr O'Keefe:
 - have a mutual commitment to a shared life to the exclusion of all others, as required by s.5CB(2)(a) of the Act;
 - have a genuine and continuing relationship, as required by s.5CB(2)(b) of the Act; and
 - live together as required by s.5CB(2)(c)(i) of the Act.
35. The Tribunal has no evidence before it, upon which it is able to make a finding about whether the parties are related by family.
36. On the basis of the above the Tribunal is not satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and the time of this decision.
37. Therefore the applicant does not meet cl.820.211.(2)(a) or cl.820.221.
38. For these reasons the Tribunal is not satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
39. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

40. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Amanda Mendes Da Costa
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).